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Negligence--Representation That Object is Harmless--Liability of Manufacturer (Crist v. Art Metal Works, 230 App. Div. 114 (1st Dept. 1930))

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NEGLIGENCE—REPRESENTATION THAT OBJECT IS HARMLESS—LIABILITY OF MANUFACTURER.—Defendant, a manufacturer of toy revolvers which emitted cold sparks, advertised the same for use "especially by children and infants of tender years," as a source of fun and as "absolutely harmless." Plaintiff, an infant, was seriously injured while using the revolver, the sparks emanating from it igniting the materials used in the Santa Claus costume in which he was dressed at the time. The defendant's motion to dismiss the complaint was granted by the trial Court. On appeal, *Held,* that it was error to dismiss the complaint. "Where a manufacturer markets an article with such a sweeping and unqualified representation that a child could not be hurt by it, an infant user actually damaged by its use is entitled to show the circumstances under which the pistol was purchased and to prove how the injury resulted and may not be summarily deprived of a trial upon which to make such proof." Crist v. Art Metal Works, 230 App. Div. 114, 243 N. Y. Supp. 496 (1st Dept., 1930).

In the case of MacPherson v. Buick Motor Co.,[1] the doctrine of liability of manufacturers to third persons for manufacturing an article causing injury was extended to include objects imminently or inherently dangerous. In that case, Judge Cardozo said, "Whether a given thing is dangerous may be sometimes a question for the court and sometimes a question for the jury." In the case at bar the trial Court held, as a matter of law, that the toy gun was not dangerous. In the Appellate Division, the dissenting justices also took this view, and, moreover, urged as a bar to liability the failure of the plaintiff to allege negligence in the manufacture of the gun. We submit that whether or not an article is imminently dangerous should be a question for the jury. But we fully agree with the majority opinion as far as it goes; that at least the plaintiff should be allowed to present evidence from which the court might decide the question. In Miller v. Sears Roebuck Co.,[2] where the facts were almost identical with those in the instant case, the complaint was dismissed at the close of the plaintiff's case, but the plaintiff had been permitted to submit evidence in support of his complaint. The allegation of facts constituting negligence in the manufacture of the article does not seem to be a necessary prerequisite to recovery. In Thomas v. Winchester,[3] negligence in the labeling of the article was said to render it imminently dangerous. So, in the instant case, advertising the gun as "absolutely harmless," which may be proved not to be the fact, may constitute negligence. In Henry v. Crook [4] a similar conclusion was drawn. In that case the defendant, a manufacturer of sparklers which he represented were harmless, was held liable for failure to give the necessary instructions and warnings in the use of the article. And where a defendant contractor had built a scaffold for a painter.

[1] 217 N. Y. 382, 111 N. E. 1050 (1916).
[2] 250 Ill. App. 340 (1928).
[3] 6 N. Y. 397 (1852).
[4] 202 App. Div. 19, 195 N. Y. Supp. 642 (3rd Dept., 1922).

and the servants of the painter were injured in the use of it, the defendant was held liable.[5] A later decision held the defendant, who was a manufacturer of coffee urns, liable to patrons of a restaurant who were injured by the explosion of an urn which he had installed.[6] These cases seem to extend the doctrine of Thomas v. Winchester[7] to objects not inherently dangerous. We submit that the extension is well made and is in accord with the popular concept of liability of the manufacturer to the prospective buyer.

A. S.

REAL PROPERTY—MARKETABILITY OF TITLE—REASONABLE DOUBT—DEPRIVATION OF EASEMENT WARRANTS REJECTION.—Plaintiff agreed, in writing, to purchase certain property in Brooklyn from defendant, and tendered the purchase price, as required by the contract, on the law day. Defendant was unable to convey the property free from certain rights conveyed by a predecessor in title, to lay water-mains, build sewers, erect lighting poles and construct an elevated railroad on the adjoining street. In an action to recover the deposit paid and to impress a lien therefor, *held,* that the rights conveyed constituted an easement, the deprivation of which rendered the property so encumbered as to justify rejection of title. Monogram Development Co. v. Northern Construction Co., 253 N. Y. 320, 171 N. E. 390 (1930).

The property contemplated in the contract did not include the fee to the highway. But even where the title to the highway is in the abutting owner, the right to construct sewers and lay water-mains does not constitute an encumbrance on his land.[1] Neither does the right to erect poles for lighting, where the owner has no fee in the highway.[2] But the owner of land abutting on the highway has an easement of light, air and access therein, even where he does not own the fee.[3] The fact that the right to build the elevated railroad might never be exercised, as claimed by the defendant, since the grant had been made in 1891, does not free the title from the encumbrance, as it is not such a remote contingency as will remove all reasonable doubt from the title. It was said by Judge Cardozo, in a recent case,[4] that, "The law assures to a buyer a title free from reasonable doubt, but not from every doubt." Whether the encumbrance complained of

[5] Devlin v. Smith, 89 N. Y. 470 (1882).
[6] Statler v. Ray Mfg. Co., 195 N. Y. 478, 88 N. E. 1063 (1909).
[7] *Supra* Note 3.

[1] Fossume v. Requa, 218 N. Y. 339, 113 N. E. 330 (1916).
[2] Ansorge v. Belfer, 248 N. Y. 145, 161 N. E. 450 (1928).
[3] Kane v. N. Y. El. R. R., 125 N. Y. 164, 26 N. E. 278 (1891); Story v. N. Y. El. R. R. Co., 90 N. Y. 122 (1882).
[4] Norwegian E. F. Church v. Milhauser, 252 N. Y. 186, 190, 169 N. E. 134, 137 (1929).